92-207

No.

In the Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER V. PADILLA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether membership in a joint venture to transport drugs gives co-conspirators a legitimate expectation of privacy entitling them to challenge the investigatory stop of one of the members of the conspiracy, and the subsequent search of the vehicle he was driving.

PARTIES TO THE PROCEEDING

In addition to the named parties, Maria Jesus Padilla, Jorge Padilla, Donald Lake Simpson, Maria Sylvia Simpson, and Warren Strubbe are respondents.*

\

* With respect to respondent Warren Strubbe, the court of appeals held that he lacks a Fourth Amendment interest entitling him to challenge the legality of the government actions at issue. Although the government prevailed against respondent Strubbe in the court of appeals, he is nonetheless a respondent in this Court. See Sup. Ct. R. 12.4.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1992

No.

UNITED STATES OF AMERICA, PETITIONER

v.

XAVIER V. PADILLA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-21a) is reported at 960 F.2d 854. The oral rulings and minute orders of the district court (App., *infra*, 22a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1992. On June 23, 1992, Justice O'Connor entered an order extending the time for filing a petition for a writ of certiorari to and including July 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

An indictment returned in the United States District Court for the District of Arizona charged respondents with conspiracy to distribute and possess with intent to distribute cocaine, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In addition, respondent Xavier Padilla was charged with engaging in a continuing criminal enterprise, in violation of 21 U.S.C. 848. The district court granted motions to suppress most of the evidence in the case. The court of appeals affirmed in part, vacated in part, and remanded. App., *infra*, 1a-21a.

1. On September 26, 1989, Officer Russell Fifer of the Arizona Department of Public Safety was patrolling on Interstate Highway 10 near Casa Grande, Arizona, when a Cadillac passed him. Although the Cadillac was initially traveling 65 to 70 miles per hour, it slowed to 50 miles per hour. The driver appeared to be acting suspiciously, so the officer followed the car for several miles. Due to a miscommunication, the police radio dispatcher informed Fifer that the license plates on the Cadillac were registered to a Pontiac. Officer Fifer signaled the driver of the Cadillac to stop, and the car pulled over. App., *infra*, 2a-3a; 5/8/90 Tr. 132-139, 143-145.

Luis Arciniega was the driver and sole occupant of the Cadillac. He gave Officer Fifer a driver's license in his own name and an insurance card in the name of respondent Donald Simpson. Another officer, who was assisting Fifer, asked Arciniega for permission to search the car for weapons or contraband, and Arciniega consented. The officer opened the trunk and immediately discovered 560 pounds of cocaine. Officer Fifer then arrested Arciniega. During the course of the stop, Officer Fifer learned from

the radio dispatcher that the initial license plate information was incorrect and that the plates were in fact registered to a Cadillac owned by respondent Donald Simpson. App., *infra*, 3a-4a; 5/15/90 Tr. 91-96.

Arciniega then agreed to make a controlled delivery of the cocaine. He made a telephone call from a motel in Tempe, Arizona, and shortly thereafter, respondents Jorge and Maria Padilla arrived at the motel. The Padillas were arrested when they tried to drive off in the Cadillac. Maria Padilla then led the officers to a house in which respondent Xavier Padilla was staying. App., *infra*, 4a-5a.

Law enforcement authorities learned that the cocaine-laden Cadillac belonged to a Customs agent, Donald Simpson. The investigation linked Simpson and his wife, respondent Maria Sylvia Simpson, to Xavier Padilla. The authorities ultimately concluded that the Simpsons and Xavier Padilla were the principals in a drug smuggling operation that transported drugs from Mexico on behalf of distributors who owned the drugs. DEA agents conducting a related investigation were able to link Warren Strubbe to the conspiracy, and they discovered another 440 pounds of cocaine, which had been unloaded from the Simpsons' Cadillac shortly before Arciniega's arrest. App., *infra*, 5a-7a; Excerpt of Record Doc. 259, at 4-8.

2. Prior to trial, respondents moved to suppress all the evidence discovered in the course of the investigation, claiming that the evidence was the fruit of the stop of Arciniega, which they argued was unlawful. Midway through the suppression hearing, the district court ruled that respondents had standing to challenge the stop of Arciniega. The court found that respondents had standing because they were involved in "a joint venture for transportation"

of the contraband, and that the joint venturers "had control of the contraband" at the time of the stop. App., *infra*, 22a.

At the conclusion of the evidentiary hearing, the district court ruled that Officer Fifer lacked reasonable suspicion to stop Arciniega.[1] App., *infra*, 25a. The court therefore "suppress[ed] the search of the Simpson vehicle being driven by Mr. Arciniega." *Id.* at 29a, 30a. Finding that there would not have been an investigation by Customs or the DEA without the illegal stop of Arciniega, the district court granted the motion to suppress all the evidence obtained during the course of the investigation. *Id.* at 31a-32a, 33a-34a.

3. The court of appeals affirmed the suppression order as to respondents Xavier Padilla, Donald Simpson, and Maria Simpson; remanded for further findings with respect to respondents Jorge and Maria Padilla; and reversed as to respondent Warren Strubbe.

a. In finding that the Simpsons and Xavier Padilla were entitled to challenge the stop of Arciniega, the court relied on a line of Ninth Circuit cases granting Fourth Amendment standing to participants in a joint criminal venture who have an interest in the place searched or the property seized by virtue of their membership in the joint venture. App., *infra*, 9a-11a. The Simpsons and Xavier Padilla had standing, the court concluded, "not simply because the Simpsons owned the car and jointly possessed the drugs with Xavier but also because they participated in the organization, particularly on the day of the stop." *Id.* at 12a.

[1] We did not challenge that ruling in the court of appeals, and we do not do so here.

The court held that Donald Simpson had standing because "[h]e was a critical player in the transportation scheme who was essential [because of his status as a Customs agent] in getting the drugs across the border." App., *infra*, 12a. Maria Simpson had standing, the court held, because she played "a supervisory role tying everyone together and overseeing the entire operation at least from the Mexico end." *Id.* at 12a-13a.

The court of appeals concluded that Xavier Padilla had standing because he "exhibited substantial control and oversight with respect to the purchase [of the drugs] in Mexico and * * * the transportation through Arizona." App., *infra*, 13a. In assessing his standing, the court concluded, "[i]t is inconsequential that he was not present at the stop nor that he was unable to exclude others from inspecting the vehicle." *Ibid.*

With respect to respondents Jorge and Maria Padilla, who attempted to pick up the cocaine-laden Cadillac following Arciniega's arrest, the court held that it was unable to determine from the record whether they were "responsible partners of the venture or mere employees in a family operation." App., *infra*, 15a. The court noted that they "did not control the drugs yet they were an integral part of the formalized business arrangement that did." *Id.* at 14a. Because it was not clear from the record, however, "if they shared any responsibility for the enterprise," *ibid.*, the court remanded for further findings on that point. Finally, the court held that co-defendant Warren Strubbe lacked standing, because he "demonstrated no active control or supervision over the drugs or the vehicle involved in this conspiracy." *Id.* at 15a-16a.

b. Having rejected the government's standing argument, the court of appeals held that the unlawful

stop of Arciniega justified the suppression of almost all the evidence discovered in the course of the ensuing investigation. App., *infra*, 17a-21a. The only evidence that the court of appeals held not to be suppressible was the statement of a witness who came forward more than two weeks after the stop of Arciniega and provided information about Xavier Padilla and Donald Simpson. *Id.* at 20a.

REASONS FOR GRANTING THE PETITION

Although respondents were not present at the stop of Luis Arciniega, the court of appeals permitted them to challenge the legality of that stop on the theory that they were joint venturers in the transportation of the drugs Arciniega was carrying. Their joint venture relationship, according to the court of appeals, gave respondents a sufficient interest in the Cadillac and the seized drugs to entitle them to challenge the stop of Arciniega, even though the stop did not interfere with their freedom of movement in any way.

The court of appeals' decision in this case is contrary to this Court's decisions holding that Fourth Amendment violations are personal and that only those whose own rights have been invaded may seek suppression of evidence seized as a result. The decision is also at odds with the law of every other circuit that has addressed the issue.

The question whether co-conspirators can acquire a legitimate expectation of privacy in each other's persons and effects based solely on their joint participation in a criminal venture is of considerable practical importance. This case illustrates that point dramatically, as the costs of suppressing the evidence against Arciniega's joint venturers are enormous. Although none of the respondents were illegally detained or searched, the courts below have suppressed

virtually all of the evidence against the leaders of the enterprise, including a corrupt federal law enforcement official, and have effectively terminated their prosecutions on serious drug trafficking charges.

1. a. The decision of the court of appeals is inconsistent with basic tenets of Fourth Amendment law. It is fundamental that "a court may not exclude evidence under the Fourth Amendment unless it finds that an unlawful search or seizure violated the defendant's own constitutional rights." *United States* v. *Payner*, 447 U.S. 727, 731 (1980); see also *ibid.* ("the defendant's Fourth Amendment rights are violated only when the challenged conduct invaded *his* legitimate expectation of privacy rather than that of a third party"). That principle follows from "the general rule that 'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" *Rakas* v. *Illinois*, 439 U.S. 128, 133-134 (1978), quoting *Alderman* v. *United States*, 394 U.S. 165, 174 (1969). This Court has accordingly stated that it is "beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices." *Payner*, 447 U.S. at 735. See *Simmons* v. *United States*, 390 U.S. 377, 389 (1968); *Wong Sun* v. *United States*, 371 U.S. 471, 492 (1963). Accordingly, the fruits of Officer Fifer's stop of Arciniega should not be excluded as to respondents unless the stop of Arciniega violated their personal Fourth Amendment rights.

In allowing respondents to challenge the stop of Arciniega because they were joint venturers in the transportation of the cocaine,[2] the court of appeals

[2] Although the court of appeals concluded that Warren Strubbe did not have a sufficient role in the conspiracy to take

followed a long line of Ninth Circuit cases. Those cases have treated participation in a conspiracy as sufficient to give rise to a privacy interest in a place searched or a property interest in items seized, if the defendant's role in the conspiracy gave him joint control or supervisory responsibility over the premises searched or the property seized. App., *infra*, 9a. See *United States* v. *Johns*, 851 F.2d 1131 (1988); *United States* v. *Broadhurst*, 805 F.2d 849, 851-852 (1986); *United States* v. *Quinn*, 751 F.2d 980 (1984), cert. granted, 474 U.S. 900 (1985), cert. dismissed, 475 U.S. 791 (1986); *United States* v. *Pollock*, 726 F.2d 1456, 1465 (1984); *United States* v. *Johns*, 707 F.2d 1093, 1100 (1983), rev'd on other grounds, 469 U.S. 478 (1985); *United States* v. *Perez*, 689 F.2d 1336 (1982). The Ninth Circuit itself has characterized its doctrine as a "coconspirator exception" to traditional tests of Fourth Amendment standing. *United States* v. *Taketa*, 923 F.2d 665, 672 (1991).

The Ninth Circuit's "coconspirator exception" is contrary to Fourth Amendment principles established by this Court. In Alderman, this Court made clear that "[c]oconspirators and codefendants have been accorded no special standing" to assert Fourth Amendment violations. 394 U.S. at 172. See also *Standefer* v. *United States*, 447 U.S. 10, 23-24 (1980); *Brown* v. *United States*, 411 U.S. 223, 230 & n.4 (1973). That rule is based on this Court's view that "the

---

advantage of the co-conspirator exception, and remanded for further findings regarding the role of Jorge and Maria Padilla, the court treated all the respondents' status as co-conspirators as an independent factor in determining Fourth Amendment standing. For ease of reference, we will sometimes refer to respondents collectively; we recognize, however, that the court of appeals has conclusively found standing only with respect to three of them.

additional benefits of extending the exclusionary rule to other defendants" are outweighed by "the public interest in prosecuting those accused of crime * * * on the basis of all the evidence which exposes the truth." *Alderman*, 394 U.S. at 175. See also *Payner*, 447 U.S. at 735. The Ninth Circuit's rule cannot be reconciled with that principle. Nor can it be reconciled with *Rawlings* v. *Kentucky*, 448 U.S. 98 (1980). There, this Court held that the defendant had no privacy interest in a purse owned by another person, despite the fact that he had entrusted the purse's owner with drugs to carry in the purse. Emphasizing that the defendant did not have "any right to exclude other persons from access to [the] purse," *id.* at 105, the Court held that the defendant's ownership interest in the drugs did not give him a right to object to the search of the purse. *Rawlings* stands in sharp contrast to the holding of the court of appeals in this case that it was "inconsequential" to Xavier Padilla's claim of standing that he was not present at the stop, and "that he was unable to exclude others from inspecting the vehicle." App., *infra*, 13a.

Respondents' status as co-conspirators does not broaden their rights under the Fourth Amendment. The fact that respondents acted in league with each other to accomplish the ends of the joint venture is irrelevant to the question whether they had a Fourth Amendment interest in Arciniega's freedom of movement that was infringed when Officer Fifer pulled him over on the highway. A defendant's role in a conspiracy has no generative force so as to create a privacy interest that does not otherwise exist.

The court of appeals sought to evade a direct confrontation with the well-settled principle that Fourth Amendment rights may not be vicariously asserted, by

limiting its joint venture exception to defendants whose roles in the conspiracy show that they had supervision and control over the joint venture. See App., *infra*, 14a-16a; see also *United States* v. *Taketa*, 923 F.2d 665, 672 (9th Cir. 1991) (noting that granting Fourth Amendment standing to defendants who had no ownership or control over the items seized would create "a true coconspirator exception of general applicability"); *United States* v. *Kovac*, 795 F.2d 1509, 1510-1511 (9th Cir. 1986), cert. denied, 479 U.S. 1065 (1987). Thus, the court of appeals focused on each respondent's role in the conspiracy, and granted or denied standing based on his or her level of involvement or supervisory status in the scheme. See App., *infra*, 12a-16a. Because the Simpsons and Xavier Padilla were "critical player[s]" (*id.* at 12a) in the joint venture, with "supervisory role[s]" (*ibid.*) that called for their "substantial control and oversight" over the criminal enterprise (*id.* at 13a), the court found that they had legitimate privacy interests that were invaded by the stop of Arciniega. With respect to Jorge and Maria Padilla, although they were "active members" (*id.* at 14a) who were an "integral part" (*ibid.*) of the criminal venture, the court found that it was unclear whether they "shared any responsibility" (*ibid.*) for the enterprise; accordingly, the court remanded for the district court "to determine whether they were responsible partners of the venture or mere employees." *Id.* at 15a. Finally, the court denied Warren Strubbe standing because he had "no active control or supervision over the drugs or the vehicle involved in this conspiracy." *Id.* at 16a.

This is entirely made up. Not only has the Ninth Circuit manufactured a complex, fact-intensive theory, that theory is beside the point. The fact that various

respondents exercised "control and oversight" over, and enjoyed "critical player" status in, a criminal venture that used the vehicle to accomplish its ends is irrelevant to the basic Fourth Amendment question—whether the police invaded any personal Fourth Amendment interest of any of the respondents when they conducted an investigatory stop of Arciniega.[3] By focusing on each respondent's role in the offense, rather than on whether each was the victim of an illegal search or seizure, the court of appeals erred.

b. The court of appeals based its standing decision with regard to Xavier Padilla and the Simpsons on their status as principals in the joint venture. It therefore did not decide whether there was any other ground on which they might have been accorded standing. For that reason, the decision below stands or falls on the viability of the Ninth Circuit's "joint venture" theory of standing.[4]

---

[3] In addition to being inconsistent with this Court's decisions, the Ninth Circuit's doctrine creates perverse results. The more prominent a defendant's role in the underlying criminal venture, the more likely he is to benefit from a suppression order based on a search or seizure involving another member of the conspiracy. A kingpin in such an operation, like Xavier Padilla or the Simpsons, may therefore be effectively immunized from prosecution, while a relatively minor figure such as Strubbe is left to face the full brunt of the government's evidence.

[4] The court noted that the Simpsons' ownership of the vehicle was relevant to the Fourth Amendment analysis, but did not suggest that that factor alone was sufficient to give them standing. App., *infra*, 12a. No other respondent had any plausible Fourth Amendment interest at stake in the stop of Arciniega other than as a function of his or her participation in the conspiracy. Under Ninth Circuit law, as the district court noted, that was enough. See App., *infra*, 23a ("with respect to Xavier Padilla, Maria Padilla and Jorge Padilla,

In any event, once respondents' roles in the drug conspiracy are removed from the Fourth Amendment calculus, it is clear that none of the respondents had any Fourth Amendment interest that was invaded by the brief highway stop of Luis Arciniega. In particular, none of the respondents can claim that their Fourth Amendment rights were violated because of their interests in the cocaine or the Cadillac.

Even if respondents had a possessory interest in the cocaine, the brief investigatory stop of Arciniega did not interfere with that interest in any meaningful way. And once the police discovered the cocaine in the trunk of the car, their right to seize the contraband overrode any possessory interest respondents could be said to have in the drugs. See *Horton* v. *California*, 496 U.S. 128 (1990); *Illinois* v. *Andreas*, 463 U.S. 765, 771 (1983); *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) ("Defendant's ownership of the bomb might give him standing to challenge such a seizure, but it would not establish its invalidity"), cert. denied, 423 U.S. 1078 (1976).[5]

Similarly, the temporary stop of Arciniega did not significantly interfere with any interest respondents had in the Cadillac. First, the Cadillac was searched pursuant to Arciniega's consent. Neither court below found that the consent to search was invalid. In-

---

they get standing solely out of the joint venture aspect of it").

[5] We agree, of course, that if respondents had a legitimate expectation of privacy in the trunk of the Cadillac, they would not lose their ability to challenge the search of the trunk merely because it contained 560 pounds of cocaine. Their possessory interest in the cocaine, however, did not give them a privacy interest in the place where it was located. See *United States* v. *Salvucci*, 448 U.S. 83, 93 (1980); *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-106 (1980).

stead, the courts suppressed the cocaine because they held that the taint of the illegal stop extended to the search of the vehicle regardless of the validity of Arciniega's consent. Because none of the respondents' constitutional rights were violated by the illegal stop, none of them should be entitled to suppression of the cocaine on a "taint" theory. See *Wong Sun* v. *United States*, 371 U.S. at 492.

The three Padillas had no arguable privacy interest in the Cadillac that could have been affected by the stop or search of the car. They did not control the movements of the vehicle, and they had no power whatever to exclude others from its use. Even the Simpsons, who owned the vehicle,[6] suffered no Fourth Amendment injury when Arciniega was stopped. The temporary stop did not interfere in any meaningful way with their right to regain possession of the car from Arciniega, and nothing in the record indicates that they retained any right to exclude others from the trunk of the car or had prohibited Arciniega from consenting to a search of the vehicle that they had entrusted to him. The Simpsons have therefore failed to show how the stop of Arciniega violated any Fourth Amendment interest of theirs. See *Rakas* v. *Illinois*, 439 U.S. at 130-131 n.1 (defendant bears "burden of establishing that his own Fourth Amendment rights were violated").

2. The court of appeals' conclusion that respondents had standing because of their "joint control and supervision over the drugs and vehicle" arising from "active participation in a formalized business arrangement" to transport the drugs (App., *infra*, 14a)

---

[6] Donald Simpson held title to the vehicle, and Maria Sylvia Simpson claimed an ownership interest based on her community property rights. See Resp. C.A. Br. 9.

conflicts with the law of every other circuit that has addressed the issue. With the exception of the Ninth Circuit, the courts of appeals have uniformly held that a defendant's participation in a joint criminal venture does not give him a protected Fourth Amendment interest in premises searched or property seized, if he would not otherwise have such an interest.

For example, in *United States* v. *Kiser*, 948 F.2d 418, 424 (8th Cir. 1991), cert. denied, 112 S. Ct. 1666 (1992), Kiser argued that the district court should have suppressed evidence obtained in the course of an unlawful stop and search of a car owned by one of Kiser's employees, who was using the car to transport cocaine on Kiser's behalf. The court of appeals held that Kiser did not have standing to object to the stop. The court noted the Ninth Circuit's "joint venture co-conspirator exception to the standing rules announced by the Supreme Court," 948 F.2d at 424, but declined to adopt that exception.

Similarly, in *United States* v. *Manbeck*, 744 F.2d 360, 373-374 (4th Cir. 1984), cert. denied, 469 U.S. 1217 (1985), the district court granted five defendants standing to object to the search of a tractor-trailer truck. The district court's theory, like the court of appeals' theory in this case, was that the defendants had an interest in the drugs found in the tractor-trailer because the defendants were engaged in a joint venture that used the tractor-trailer for smuggling drugs. The court of appeals reversed, holding that the four defendants who were not present at the time of the search had not established a sufficient interest in the tractor-trailer to entitle them to challenge its search. The court held that the joint interest in the drugs did not confer standing: "The privacy interest that must be established to support

standing is an interest in the area searched, not an interest in the items found." 744 F.2d at 374.

The Eleventh Circuit similarly refused to recognize "joint venture standing" in *United States* v. *Brown*, 743 F.2d 1505 (1984). In that case, Brown hid cocaine on a co-conspirator's person. When the police searched the co-conspirator and found the cocaine, Brown moved to suppress it. The court of appeals rejected Brown's claim, holding that he did not have a Fourth Amendment interest in the personal integrity of his co-conspirator, even while his co-conspirator was transporting drugs belonging to both of them. 743 F.2d at 1507-1508. See also *United States* v. *Soule*, 908 F.2d 1032, 1036 (1st Cir. 1990) (rejecting "derivative standing" doctrine raised by defendant to challenge search of co-defendant's truck); *United States* v. *DeLeon*, 641 F.2d 330, 337 (5th Cir. 1981) (defendant does not have standing to challenge search of a bag in the possession of his agents and co-conspirators); *United States* v. *Galante*, 547 F.2d 733, 739-740 (2d Cir. 1976) (co-conspirators or co-defendants have no special rights under the Fourth Amendment, and a possessory interest in goods seized from another's property is insufficient to establish right to object to seizure), cert. denied, 431 U.S. 969 (1977); *United States* v. *Lisk*, 522 F.2d 228, 230-231 (7th Cir. 1975) (defendant, who gave bomb to friend to hold in trunk of his car until he asked for its return, did not have standing to challenge the search of the car; while he had standing to challenge seizure of the bomb, the seizure of the contraband did not violate the Fourth Amendment) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976).

Several courts have noted that the Ninth Circuit stands alone in its acceptance of "joint venture"

standing. See *United States* v. *Kiser*, 948 F.2d at 424 (noting and rejecting the Ninth Circuit's "joint venture co-conspirator exception to the standing rules announced by the Supreme Court"); *United States* v. *Gerena*, 662 F. Supp. 1218, 1245, 1247 n.30 (D. Conn. 1987) ("joint-venture standing" theory is "indistinguishable from the discredited co-conspirator and membership standing arguments"; the Ninth Circuit "stands by itself in its willingness to accept the viability of joint-venture standing"); *United States* v. *Schuster*, 775 F. Supp. 297, 305 (W.D. Wis. 1990) (Ninth Circuit's recognition of standing based upon a "formalized arrangement" is "in direct conflict" with Seventh Circuit law).

Seven years ago, we sought review of the same question, and the Court granted certiorari. *United States* v. *Quinn*, 751 F.2d 980 (9th Cir. 1984), cert. granted, 474 U.S. 900 (1985), cert. dismissed, 475 U.S. 791 (1986). After briefing and argument, the Court dismissed the petition, apparently concluding that the case was a poor vehicle for resolving the issue of joint venture standing.[7] This case, however, presents the issue cleanly. The conflict over the validity of "joint venture standing" has persisted. The Ninth Circuit's rule continues unjustifiably to impede law enforcement efforts in that region. Accordingly, this Court's review is warranted.

[7] The defendant in *Quinn* was the owner of a boat that was seized and later searched. The Ninth Circuit held that, despite his lack of presence at the events in question, the defendant could contest the validity of the boat's search on the basis of the joint venture theory. See *United States* v. *Quinn*, 751 F.2d 980 (1984). At oral argument in this Court, however, the question was raised whether the defendant's ownership of the boat was sufficient to permit him to contest the initial seizure without reference to the joint venture doctrine. Tr. of Oral Argument 19-25, *United States* v. *Quinn*, No. 84-1717 (argued March 5, 1986). After argument, the case was dismissed with two Justices dissenting. See 475 U.S. 791 (1986).

This case does not present the factual difficulties the Court apparently perceived in *Quinn*. Although the Simpsons had an ownership interest in the Cadillac, that interest was not affected by the stop of Arciniega. In any event, no other respondent had any proprietary interest in the car; each of those respondents is entitled to standing, if at all, only through participation in the criminal conspiracy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

WILLIAM K. KELLEY
Assistant to the Solicitor General

PATTY MERKAMP STEMLER
Attorney

JULY 1992

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-10311

D.C. No. CR-89-0408-RMB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

XAVIER V. PADILLA; MARIA JESUS PADILLA, aka SUZY; JORGE PADILLA; DONALD LAKE SIMPSON; WARREN STRUBBE; MARIA SYLVIA SIMPSON, DEFENDANTS-APPELLEES

No. 90-10316

D.C. No. CR-88-0317-RMB

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

XAVIER V. PADILLA, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the District of Arizona
Richard M. Bilby, Chief District Judge, Presiding

Argued and Submitted
September 19, 1991—San Francisco, California
Filed April 1, 1992

Before: Herbert Y.C. Choy, Arthur L. Alarcon and Thomas G. Nelson, Circuit Judges

Opinion by Judge T.G. Nelson

OPINION

T.G. NELSON, Circuit Judge:

The United States appeals an order of the district court holding that the defendants had standing to bring a motion to suppress, that there was no reasonable suspicion for the stop of a vehicle, and that the doctrines of attenuation and independent source are not applicable to this case. We affirm as to three of the defendants, remand for further proceedings for two others and reverse as to the last.

I. FACTS

On September 26, 1989, an Arizona trooper, Officer Russell Fifer, observed a 1976 Cadillac traveling westbound on the interstate. The officer noted that the vehicle appeared to be traveling slightly in excess of the speed limit (65 m.p.h.), although he admitted that the vehicle's speed was not excessive and that he would not have pulled over the vehicle for that speed.

At the suppression hearing, Fifer testified that the driver acted suspiciously. Upon noticing the officer, the driver jerked his head and stiffened. He passed

the patrol vehicle and continued to view him through the side view mirror.

Fifer followed the vehicle for approximately eleven miles and testified that during this time the vehicle slowed down, traveling speeds that varied from 50 to 60 miles per hour. The officer radioed in the license plate number of the vehicle and was initially informed that the license plates belonged to a Pontiac, not a Cadillac. There was confusion regarding the plates but ultimately it was determined at the scene that the plates were, in fact, correct. Fifer testified, however, that the basis for his decision to stop the vehicle was not the possibility of the fictitious plate. Rather, he stopped the vehicle for driving at a speed he decided was too slow.

The officer testified that he believed he could stop a vehicle for driving at a slow speed if he believed the speed was not "reasonable and prudent." Fifer testified that he routinely issued both citations and warnings to travelers driving significantly slower than the posted limit. The defense introduced evidence that there is no posted minimum speed limit on the stretch of interstate where the vehicle was stopped.

Having pulled over the Cadillac, the officer questioned the driver, Luis Arciniega. Arciniega produced a valid driver's license and proof of insurance demonstrating that a customs official, defendant Donald Simpson, owned the Cadillac.

Another Department of Public Safety (DPS) officer, Robert Williamson, appeared on the scene. Both officers believed that Arciniega matched a drug courier profile. Accordingly, they requested and received Arciniega's consent to inspect the vehicle whereupon they discovered 560 pounds of cocaine concealed in the trunk.

The timing between the actual arrest and the resolution of the license plate mix-up is close. Fifer testified that the problem with the plates had been cleared up by 11:46 a.m. and that the arrest occurred at 11:50 a.m. Williamson's testimony confirms that the search of the trunk was not conducted until after the officer had learned of the license plate error.

Following the search, a third officer, Vanderpoole, was dispatched to the scene. Vanderpoole informed Arciniega that "[h]e was looking at at least twenty five years in prison; and since he was 50, he might not make it out of prison." Vanderpoole assured Arciniega that if he assisted the police, however, they would not file charges against him with the county attorney. Not surprisingly, Arciniega promptly agreed to cooperate. After a brief interrogation, it became apparent that Arciniega was merely a courier or "mule," carrying the load for other yet unidentified conspirators and the officers set out to apprehend Arciniega's "employers." DPS took Arciniega, the vehicle, and a portion of the cocaine to the Regal 8 Motel in Tempe where he was instructed to telephone his contact. He called what turned out to be the home of Alicia Padilla Romero, the sister of defendants Jorge and Xavier Padilla.

He spoke with apparent familiarity to an individual identified only as "Pollo" who promised to dispatch a runner to retrieve the load at the motel. Jorge Padilla and Maria Jesus "Suzy" Padilla, arrived at the motel in a white sedan. Jorge attempted to start the Cadillac while Maria began pulling the sedan out of the parking lot. DPS surrounded both vehicles and both defendants were immediately arrested. The officers found a rental contract in the white sedan bearing the name of Xavier Padilla, the brother of Jorge and husband of Maria.

Following a lead from Maria, the investigators proceeded to Alicia Padilla Romero's house. While they were questioning Alicia, Xavier Padilla entered the residence. He indicated under questioning that he had been staying with Alicia only temporarily and did not directly implicate himself. The officers did not arrest Xavier at that time and in fact did not do so until January of the following year.

The following day, however, DPS informed the U.S. Customs Service that Customs Inspector Simpson's automobile was involved in a drug seizure. Customs agents and DPS investigators interrogated Luis Arciniega who further implicated Simpson. As a direct result of Arciniega's statements, a search warrant was issued on Simpson's home which resulted in the recovery of incriminating evidence implicating both Simpson and his wife, defendant Maria Sylvia Simpson.

On October 6, 1989, agents from the Customs Department, DEA and the Arizona Department of Public Safety all met with government counsel and agreed to cooperate and exchange information. This meeting is documented in an internal memorandum from the Customs Service and confirms that DPS information had been incorporated into all federal investigations which were commenced after the drug seizure.

Meanwhile, on October 12, 1989, in an apparently unrelated incident, Guillermo Owen was arrested in Sierra Vista, Arizona, for possessing a small amount of cocaine and paraphernalia. In an attempt to cut a deal, Owen offered what he knew about Arciniega's arrest a few weeks earlier. Owen discussed at length his involvement with Luis Arciniega, Arciniega's son Frank, defendant Warren Strubbe and various other players. From the DEA report evidencing the inter-

rogation, it appears that he did not, however, provide information regarding Mrs. Simpson, Jorge or Maria Padilla. Furthermore, the report only makes two brief references to Xavier and one to an unidentified customs official, presumably, Donald Simpson.[1]

Owen stated that he helped Strubbe and the Arciniegas unload about half of a large but unspecified amount of cocaine from a white and red Cadillac into Strubbe's Tucson apartment. A short time later, Arciniega departed with the remaining cocaine still in the Cadillac. Owen stated that he, Frank Arciniega and Strubbe delivered the cocaine from Strubbe's apartment to a storage facility rented by a Troy Barlous. After interrogating Owen and obtaining additional information, the DEA agents were issued a search warrant for the storage unit and uncovered 440 pounds of cocaine.

After a thorough reading of the record which includes reports from Customs, DEA, and the Arizona Department of Public Safety, an overall picture emerges. Xavier Padilla and the Simpsons were not drug merchants but were in the business of transporting contraband across the border for those that were. The seized cocaine was apparently owned by a cartel known as the "El Tejano" organization. Both Xavier Padilla and Sylvia Simpson had previously

[1] The reference in the DEA Report of Investigation dated October 17, 1989, are as follows: (1) "OWEN stated Frank [Arciniega] received a telephone call and informed OWEN that it was from Javier PADILLA in California who informed him that Louis had been arrested with the load of cocaine and had fingered him, (2) "OWEN stated that on 10-14-89, he was in the exercise yard with Louis Arciniega. OWEN stated that Louis told him that if Javier (PADILLA) did not take care of him and his family, he (Louis) would tell about the Customs guy that was involved with him."

met with these people in Mexico and had successfully delivered three other loads. Jorge and Maria Padilla were possibly mere "employees" of the conspiracy and were under the direct supervision of Xavier.

Warren Strubbe was not a member of the transportation conspiracy responsible for the load seized from the illegal stop. According to Owen, Strubbe came in contact with the seized cocaine but did so only briefly. Instead, he participated in a separate conspiracy involving a separate load. While apparently the cocaine was initially combined, it had been divided and Strubbe's share parted ways with the confiscated load before the stop of Arciniega. Strubbe's connection with the seized load ended at the point of division.

II. PROCEEDINGS BELOW

The district court determined that there was no founded suspicion for the stop of the vehicle. The government does not appeal this issue nor will we address it. The government does appeal, however, the district court's conclusion that all of the defendants had standing to contest the illegal stop and seizure of the cocaine found in the Cadillac even though none was present at the stop and only the Simpsons owned the vehicle. The court ruled that because they all exhibited sufficient control and supervision over the contraband, they could claim a legitimate expectation of privacy in the vehicle searched and the contraband seized.[2] The district court said:

[2] The term "standing" is used when discussing who may assert a particular Fourth Amendment claim. "Fourth amendment standing is quite different, however, from the 'case or controversy' determinations of Article III. Rather it is a matter of substantive fourth amendment law; to say that a

> I think it is clearly a joint venture and even though it is a joint venture for transportation, as distinguished from ownership, it was a joint venture that had control of the contraband.

The court further found that the stop "clearly led to the subsequent activities of the day when the car was delivered to Tempe; that without that stop, there would not have been any involvement by the DPS, nor would they have informed Customs and DEA about that." The government now appeals the suppression of the seized evidence. We affirm the district court's suppression with respect to Xavier Padilla and Donald and Sylvia Simpson, but we have insufficient facts before us to determine whether Jorge and Maria Padilla had a legitimate expectation of privacy and remand for additional findings of facts regarding them. We further hold that Warren Strubbe has not demonstrated sufficient standing and reverse the district court's decision as to his claim. Because we reach differing conclusions as to the various defendants, their positions will be discussed separately.

III. DISCUSSION

STANDING

Standard of Review

Mixed questions of law and fact are generally reviewed *de novo* although the clearly erroneous standard applies if the necessary analysis is primarily factual in nature. *United States v. McConney*, 728 F.2d 1195, 1202-1203 (9th Cir. 1984) (en banc).

---

party lacks fourth amendment standing is to say that *his* reasonable expectations of privacy have not been infringed." *United States v. Taketa*, 923 F.2d 665, 669 (9th Cir. 1991) (citing *Rakas v. Illinois*, 439 U.S. 128, 139-140 (1978)).

Issues of standing are generally reviewed *de novo*. *United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987). The district court's factual findings on the issue of standing must be accepted unless clearly erroneous. *United States v. Broadhurst*, 805 F.2d 849, 851 (9th Cir. 1986).

1. The Simpsons and Xavier Padilla

As we will explain, the Simpsons and Xavier Padilla have established a legitimate expectation of privacy. The government challenges their standing because none of the defendants was present at the time of the arrest nor exhibited physical control of the vehicle or contraband. The Simpsons base their standing not only on their ownership of the car but also because they engaged in an organized effort to transport the contraband. Xavier Padilla argues that his ultimate responsibility for the load and the facts resulting from that role confer standing.

To contest the legality of a search and seizure, the defendants must establish that they had a "legitimate expectation of privacy" in the place searched or the property seized. *Rakas v. Illinois*, 439 U.S. 128, 143-44 (1978). "Neither ownership nor presence are required to assert a reasonable expectation of privacy under the Fourth Amendment." *United States v. Johns*, 851 F.2d 1131, 1136 (9th Cir. 1988); *United States v. Perez*, 689 F.2d 1336, 1338 (9th Cir. 1982) (per curiam). Instead, we have consistently held that a coconspirator's participation in an operation or arrangement that indicates joint control and supervision of the place searched establishes standing. *United States v. Davis*, 932 F.2d 752 (9th Cir. 1991); *United States v. Quinn*, 751 F.2d 980 (9th Cir. 1984) (per curiam), *cert. dismissed*, 475 U.S.

791 (1986); *United States v. Pollock*, 726 F.2d 1456 (9th Cir. 1984).

In ruling that the all defendants had standing, the district court determined that they were clearly participants in a joint venture. The defendants were "involved in the joint control over a very sophisticated operation involving ownership in Mexico or Colombia, [and] transportation aspects of the business [were] controlled by these people, and I think under those circumstances they have standing." With respect to these three defendants, we agree. Not only was there a formal arrangement for the transportation, the defendants shifted responsibility for the contraband between each other at various stages of the relay.

Our case law "is far from clear on the question of what a formal arrangement for joint control actually means. . . . We engage in fact-specific analysis that includes consideration of the degree of cooperation and the respective possessory interests asserted." *United States v. Taketa*, 923 F.2d 665, 671 (9th Cir. 1991). In so doing, we examine the totality of the circumstances to determine if the defendant's legitimate expectations of privacy were violated. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Kovac*, 795 F.2d 1509, 1510 (9th Cir. 1986), *cert. denied*, 479 U.S. 1065 (1987).

For example, in *United States v. Johns*, 707 F.2d 1093 (9th Cir. 1983), *rev'd on other grounds*, 469 U.S. 478 (1985), two pilots who had already offloaded the contraband enjoyed standing to contest the search of a truck and seizure of the marijuana. Their standing was based on the fact that they "shared a bailor/bailee relationship" with the defendants who had possession of the drugs and were present during the search. *Id.* at 1099-1100. The pilots owned the

marijuana but never argued that they owned nor controlled the vehicle that was searched. It was their formalized arrangement and possessory interest in the drugs which gave them a legitimate expectation of privacy. *See, e.g., United States v. Quinn*, 751 F.2d 980, 981 (9th Cir. 1984) (absent defendant had standing to contest search because he owned the boat searched and had a possessory interest in the marijuana seized); *United States v. Pollock*, 726 F.2d 1456, 1465 (9th Cir. 1984) (defendant exercised "joint control" over drug laboratory in his friend's house); *United States v. Perez*, 689 F.2d 1336, 1337-38 (9th Cir. 1982) (per curiam) (defendants who accompanied vehicle could contest seizure of drugs from truck driven by coconspirator); *United States v. Davis*, 932 F.2d 752, 757 (9th Cir. 1991) (defendant who had key to another's apartment, could come and go as he pleased, and stored items in a locked safe for privacy held to have standing); *United States v. Robertson*, 606 F.2d 853, 858 n.2 (9th Cir. 1979) (overnight guest had standing to assert Fourth Amendment violation in search of his possessions).

In fact, "[i]n virtually every case applying the coconspirator exception, the party granted standing to contest the search of another's property himself had an ownership interest in seized or searched property." *United States v. Taketa*, 923 F.2d 665, 671 (9th Cir. 1991). In *Taketa*, the court rejected the defendant's standing argument because he asserted no ownership interest in the items seized. We recognize that the defendants here did not *own* the contraband in the strict sense that the *Johns* defendants did. Nevertheless, they held a possessory interest in the same sense that the proprietors of a delivery service would possess a package.

Accordingly, the Simpsons and Xavier Padilla had standing not simply because the Simpsons owned the car and jointly possessed the drugs with Xavier but also because they participated in the organization, particularly on the day of the stop. Simpson, himself, was directly involved in the scheme. Obviously, his greatest asset to the conspiracy was his status as a customs official and his ownership of the car which avoided a search of his vehicle at the border. This, combined with evidence found at his home and the telephone records linking his customs station to the Padilla home and to a number in Agua Prieta, Mexico, supports the district court's finding that he had a coordinating and supervisory role in the operation. He was a critical player in the transportation scheme who was essential in getting the drugs across the border. Simpson established standing.

His wife, Maria Sylvia Simpson, arranged for the pickup of the drugs in Mexico and travelled across the border, keeping contact with the load.[3] It appears that she provided a communication link between her husband, Xavier Padilla, and the El Tejano people.[4] She held a supervisory role tying everyone

[3] Neither Simpson can establish standing solely by the conduct of his or her spouse. *See Kovac*, 795 F.2d at 1511 (a defendant could not assert standing by claiming he had a right to exclude others from access to his wife). They need not claim such an interest, however. Both exercise independent ownership of the vehicle and supervision or control over the drugs or participation in the operation. Moreover, their joint participation in the venture is one more factor contributing to the totality of the circumstances. *See Id.* at 1510, 11.

[4] In his statement to the DEA, Xavier Padilla described the final meeting between himself, Sylvia and Oscar Monge, the contact with "El Tejano" who has sometimes been individually been referred to by that name. In this meeting, Sylvia

together and overseeing the entire operation at least from the Mexico end. To continue with the delivery service analogy, she was the manager of the pickup point. Consequently, she also has established an expectation of privacy.

Xavier Padilla, for his part, exhibited substantial control and oversight with respect to the purchase in Mexico and primarily, the transportation through Arizona. DEA Agent Plover testified to the Grand Jury that he believed that Xavier Padilla probably had ultimate responsibility for the contraband on the day of the stop. Xavier indicated to the agent that it was he who was on the other end of the line when Arciniega called from the motel to make arrangements for pickup. Furthermore, he was participating in the negotiations with Mrs. Simpson and Oscar Monge in Agua Prieta. He had a possessory interest in the drugs equal to that of Mrs. Simpson and exhibited an equal degree of responsibility. It is inconsequential that he was not present at the stop nor that he was unable to exclude others from inspecting the vehicle. *See Johns*, 707 F.2d at 1100; *Perez*, 689 F.2d at 1338. Finally, as the man in charge, he sent his wife and brother to retrieve the load and was the principal contact with the "client," reflecting an overall responsibility to receive the drugs.

The complex relationships among these three defendants demonstrate that they were engaged in a sophisticated operation. Joint control can be established where the defendants were actively involved in

complained to Monge that she had not been paid for the previous three loads that she had "crossed" from Agua Prieta to Douglas, Arizona. Monge assured Sylvia that he would pay her for all deliveries after she had crossed the fourth and final load. At that point, Sylvia acquiesced and agreed to deliver the last load.

a formal arrangement for transportation. *Quinn*, 751 F.2d at 981. The fact that the defendants in this case insulated themselves from the mule, Arciniega, is an example of their sophistication. Previously, we have considered efforts to avoid detection as one more factor demonstrating a reasonable expectation of privacy. *See Pollock*, 726 F.2d at 1465 (defendant's participation in relocating methamphetamine lab to avoid detection demonstrated expectation of privacy). We hold, therefore, that because Xavier Padilla and Donald and Maria Simpson have demonstrated joint control and supervision over the drugs and vehicle and engaged in an active participation in a formalized business arrangement, they have standing to claim a legitimate expectation of privacy in the property searched and the items seized.

2. Jorge and Maria Padilla

Jorge and Maria Padilla argue that they are entitled to standing primarily because they were active members of a formalized business arrangement on the day they attempted to retrieve the cocaine. It is evident that they were surrogates of the organization intending to retrieve the cocaine for their apparent superiors. They did not control the drugs yet they were an integral part of the formalized business arrangement that did. *See United States v. Broadhurst*, 805 F.2d 849, 851-52 (9th Cir. 1986) (codefendants distributed responsibilities for marijuana cultivation and processing cocaine, evidencing formalized business arrangement). It is not clear from the record, however, if they shared any responsibility for the enterprise. Xavier told the DEA that Jorge and Maria were following his orders when they arrived at the Regal 8 Motel. They intended to become the subsequent leg in the transportation scheme and

would have held much the same bailee status as Luis Arciniega, only closer by blood and proximity to the boss. This, in and of itself, is not enough to confer standing. *See United States v. Aikens*, 946 F.2d 608, 613 (9th Cir. 1990) (crew member had no standing to challenge search of vessel). On one end of the spectrum we have Luis Arciniega, a pawn working for a wage, on the other end we have the Simpsons and Xavier Padilla who were running the show. Jorge and Maria fall somewhere within these extremes but as the record now stands, we cannot determine where.

Xavier acknowledged in his statement to the DEA that Jorge and Maria knew what they were doing when they went to the motel. This does not necessarily evidence responsibility in the joint venture, however. Additionally, while their familial relationship with Xavier adds to the totality of the circumstances test by demonstrating their personal connection with Xavier, it does not confer standing by itself. *See Kovac*, 795 F.2d at 1511. On remand, we ask the district court to determine whether they were responsible partners of the venture or mere employees in a family operation.

3. Warren Strubbe

The above analysis discusses an ongoing relationship among defendants and a variety of actions on the day of the stop demonstrating active participation in a transportation scheme. By contrast, Strubbe was noticeably absent from the day's events and can only argue that he was a passive participant in the larger conspiracy. The mere involvement in a conspiracy does not, by itself, suffice. *United States v. Toliver*, 433 F.2d 867, 869 (9th Cir. 1970), *cert.*

denied, 401 U.S. 913 (1971). To hold that Strubbe had standing when he was only a participant in the larger criminal conspiracy, would be to create a "true coconspirator exception of general applicability." *Taketa*, 923 F.2d at 672. We concluded in *Taketa* that such an exception to *Rakas* which would provide standing for any person accused of criminal conspiracy would be in clear contravention of holdings of the Supreme Court and this circuit. *Id.* (citing *Alderman v. United States*, 394 U.S. 165, 172 (1969)); *United States v. Turner*, 528 F.2d 143, 164 (9th Cir.), *cert. denied*, 423 U.S. 426 (1975)). Strubbe did not monitor the load, prepare to retrieve it, nor did he own the vehicle transporting it. In fact, he is part of a wholly separate illegal effort involving the cache in the storage unit. When Luis Arciniega drove away with the cocaine that was ultimately seized, Strubbe no longer had any control or apparent interest in the contraband or his conspiracy to deliver it. *See United States v. Mendia*, 731 F.2d 1412, 1414 (9th Cir.) (defendant abandoned expectation of privacy by turning heroin over to conconspirator and by not following when coconspirator drove away with the heroin in his trunk), *cert. denied*, 469 U.S. 1035 (1984).

His limited contact differs markedly from the others who aided transportation, monitored the drugs or claimed possessory interests in the seized drugs, the vehicle, or both. *See Perez* 689 F.2d at 1338. Consequently, Strubbe cannot claim standing because he has demonstrated no active control or supervision over the drugs or the vehicle involved in this conspiracy.

SUPPRESSION

Factual findings during a suppression hearing are accepted unless clearly erroneous. *United States v. Echegoyen*, 799 F.2d 1271, 1277 (9th Cir. 1986). Whether evidence resulting from an illegal stop is sufficiently tainted to require supression is a mixed question of law and fact that we review *de novo*. *United States v. Johns*, 891 F.2d 243, 244 (9th Cir. 1989); *United States v. Limatoc*, 807 F.2d 792, 794 (9th Cir. 1987).

The district court determined that the stop was unreasonable and that all subsequent information compiled that day would not have been discovered without it. The court based its ruling on *United States v. Johns*, 891 F.2d 243 (9th Cir. 1989). In *Johns*, the court stated:

> Our court has considered the question in terms of the substantiality of the taint. "'[I]f the illegally obtained leads were so insubstantial that their role in the discovery of the evidence sought to be suppressed 'must be considered *de minimus*, then suppression is inappropriate.' . . . In *Bacall*, the court emphasized that it was not using just a "but for" test, but was inquiring whether the illegally obtained evidence "tended significantly" to direct the investigation toward the evidence in question.

Johns, 891 F.2d at 245 (quoting *United States v. Bacall*, 443 F.2d 1050, 1056 (9th Cir.), *cert. denied*, 404 U.S. 1004 (1971) (quoting *Durham v. United States*, 403 F.2d 190, 196 (9th Cir. 1968) (internal citations omitted))).

Here, the impetus behind the DEA and Customs investigations was clearly the stop of Arciniega. The

documents before the district court indicate that the reason for the investigation of Simpson was because his vehicle was apprehended in a drug seizure.[5] Two of the Padillas were arrested directly from the telephone call from the motel. Xavier Padilla was immediately implicated as a direct result of the seizure. The illegal stop was the sole reason for discovering the drugs and these defendants. The exploitation of the primary illegality could hardly be more direct. *See Johns*, 891 F.2d at 245. *See also United States v. Chamberlain*, 644 F.2d 1262, 1269 (9th Cir. 1980), *cert. denied*, 453 U.S. 914 (1981).

The Government argues, however, that Arciniega's cooperation separated his information from the illegal arrest. It is well settled that even "granting [the] establishment of the primary illegality," if the prosecution can demonstrate that the evidence was obtained independently, the primary taint has been purged. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963).

It was held in *United States v. Ceccolini*, 435 U.S. 268, 276 (1978), that a living witness's testimony or information will not purge the taint when the testimony was not of the person's free will. The Court cautioned, however, that before live witness testimony or, in this case, information, as opposed to tangible evidence, will be suppressed, a "closer more

[5] The Report of Investigation prepared by the United States Customs Service indicates that Simpson was identified as a possible coconspirator only after a meeting with DPS following the seizure. Moreover, this memorandum, prepared October 18, 1989, substantiates that agents from Customs, DTA, DPS and the U.S. Attorney's office intended to integrate their efforts and based their investigation on the information supplied by DPS.

direct link between the illegality and . . . testimony is required." *Id.* at 278.

We find such a direct link here. First, we recognize the heavy weight upon a man's shoulders who has just been arrested with hundreds of pounds of drugs in the car he was driving. The significance of this pressure is critical not just for its emotional impact but because we previously have studied the amount of time that elapsed between the illegal search and the questioning. *United States Ramirez-Sandoval*, 872 F.2d 1392, 1397 (9th Cir. 1989). The discovery of the cocaine and the questioning of Arciniega were virtually simultaneous events.

Secondly, we are persuaded by the fact that the identities of the defendants would not have been known without the seizure and subsequent questioning of Arciniega. In *Ramirez-Sandoval*, we noted that "the identity of the witnesses and their relationship to the defendants were not known to the policemen and would not have been discovered in the absence of the illegal search." *Id.* at 1398 (citing *United States v. Rubalcava-Montoya*, 597 F.2d 140, 143-44 (9th Cir. 1978) ("here there is no indication that the connection between the crime and the witnesses would have been discovered from a source independent of the illegal search") (citations omitted)).[6] Also, as in *Ramirez-Sandoval* and *Rubalcava-Montoya*, there is no indication that the informant would have come forward of his own accord. In fact, it would have been ludicrous to suggest that he would. We stated in *Ramirez-Sandoval*, "[o]n the contrary,

[6] See also *United States v. Scios*, 590 F.2d 956, 963 (D.C. Cir. 1978) (en banc) (*Ceccolini* distinguished because the government only learned of the potential witness after illegally searching the defendant's files).

[the witnesses] had every incentive not to do so because they participated in the illegal activity." 872 F.2d at 1398.[7]

We conclude that Arciniega's cooperation was the direct result of his arrest and his position as a putative defendant. His "roadside deal" was too inextricably linked to the seizure and too closely related to the discovery of the defendants to purge the taint. Therefore, the district court properly suppressed all evidence seized based on the illegal stop against the Padillas and Simpsons.[8]

The Government argues that Guillermo Owen's statements should not have been suppressed and we agree. Although he only incriminated Xavier Padilla and Donald Simpson marginally, Owen was the kind of independent source that will be separated from the primary illegality. Over two weeks elapsed before he talked to the DEA about the illegal stop. He came forward independently to extricate himself from a wholly unrelated drug arrest. "Where police misconduct did not induce the witness' cooperation, the testimony will not be suppressed even though the unreasonable intrusion was one step in a series of events that led to the witness testifying." *United States v. Hooten*, 662 F.2d 628, 632 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982). His statements are distinguishable from Xavier Padilla's because the latter was arrested as the result of the investigation which flowed from the illegal stop. In Padilla's case, the seizure played the critical role in his decision to cooperate with the DEA. *See United States v. Leonardi*, 623 F.2d 746, 752 (2d Cir.), *cert. denied*, 447 U.S. 928 (1980).

[7] This court has never adopted a per se rule limiting *Ceccolini* to "good citizen" witnesses who testify "out of a sense of civic duty," nor do we do so now. *Ramirez-Sandoval* at 1398 (quoting *United States v. Hooton*, 662 F.2d 628, 633 (9th Cir. 1981), *cert. denied*, 455 U.S. 1004 (1982). We still adhere to an analysis that looks to the incentive behind a person's decision to come forward when discussing the attenuation determination.

[8] The entire coordinated investigation was based solely on the illegal stop of Arciniega. Consequently, with the exception of Owen's statements which while derivative, came independently into the hands of the investigators, all evidence before the district court was properly suppressed. This includes evidence recovered in the Simpson home as well as the post-arrest statements made by Xavier Padilla and Luis Arciniega.

IV. CONCLUSION

With respect to standing, we hold that the district court's factual findings pertaining to Donald Simpson, Maria Sylvia Simpson and Xavier Padilla were not clearly erroneous and that its applications of law were correct. We further hold that it properly suppressed evidence seized from the vehicle driven by Luis Arciniega or obtained directly because of the stop. We remand to the district court for further findings of fact as to Jorge and Maria Padilla because we are unable to determine their degree of responsibility. If it is ultimately determined that they had standing, the suppression analysis applies to them as well. Finally, we hold that the district court's finding that Warren Strubbe had standing was clearly erroneous. Consequently, we need not discuss the suppression issue with respect to him.

AFFIRMED in part, VACATED in part, and REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-89-408-T-RMB

UNITED STATES OF AMERICA, PLAINTIFF

vs.

XAVIER V. PADILLA, MARIA JESUS PADILLA, JORGE PADILLA, DONALD LAKE SIMPSON, WARREN STRUBBLE, MARIA SYLVIA SIMPSON, DEFENDANTS

May 8, 1990
9:00 o'clock a.m.

HEARING ON PENDING MOTIONS

Before THE HONORABLE RICHARD M. BILBY

* * * * *

[128] THE COURT: Well, it's the finding of the Court that under the circumstances in this case the parties do have standing to challenge the search. I think it is clearly a joint venture, and even though it was a joint venture for transportation as distinguished to a joint venture for ownership, it was a joint venture that had control of the contraband. Clearly they took it from one spot to another, from Douglas to Tucson, separated the load, took it on to another place in Tempe, they intended to have con-

trol over it. Clearly they had—Xavier Padilla had a supervising role over it, the two Simpsons owned the car; they had not given up their interest in the car; it was in the locked trunk of the car. And I think they have a [129] reasonable expectation of privacy there.

I think that with respect to Xavier Padilla, Maria Padilla and Jorge Padilla, they get standing solely out of the joint venture aspect of it. And I think that is clearly here. This isn't just a simple conspiracy, but they were involved in the joint control over a very sophisticated operation involving ownership in Mexico and Colombia, transportation aspects or the business controlled by these people, and I think under those circumstances they have standing. So I will allow them to contest it.

I would like to hear the testimony first from the arresting officers, so let's get going.

* * * * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CRIMINAL MINUTES (Tucson-Globe Division)

Date: May 8, 1990

88/ 317/ 3

89/ 408/ 1-6

Yr Case# Dft#

U.S.A.

vs.

PADILLA, ET AL XAVIER V

HONORABLE RICHARD M. BILBY

[Filed May 16, 1990]

Proceedings: HEARING PENDING MOTIONS: Open Court

Counsel make statements to the Court. Witnesses sworn and examined, Exhibits marked and admitted.

ORDERED AS FOLLOWS:

* * * * *

Pursuant to Findings on the Record,

The Court finds that defendants have standing in the Motion to Suppress the search/seizure of co-defendant Arcinega in the Simpson vehicle.

* * * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-89-408-T-RMB

UNITED STATES OF AMERICA, PLAINTIFF

vs.

XAVIER V. PADILLA, MARIA JESUS PADILLA, JORGE PADILLA, DONALD LAKE SIMPSON, WARREN STRUBBLE, MARIA SYLVIA SIMPSON, DEFENDANTS

May 15, 1990
Tucson, Arizona

HEARING ON PENDING MOTIONS

Before THE HONORABLE RICHARD M. BILBY

* * * * *

[176] THE COURT: It's the finding of the Court that Officer Fifer did not have founded suspicion for making the stop, based upon the following facts: First, his report never states that a stop was based on the slow speed. There is nothing in the tape that indicates that.

Secondly, though he came in and testified here at trial to that, he says it was based on slow speed, and later the fictitious plates, and he specifically stated that it was a violation of state law, the slow speed, which I think the record clearly shows is not the fact.

While I don't believe he was lying, I cannot help but have his credibility drawn into question in light of the fact that I gave him a specific order not to do certain things, and he promptly went out and did them, that he had listened to the tape two or three times.

I don't know that that really changed his testimony any; otherwise, I would have stricken it. But it's just—it does bear on credibility.

[177] Further, at some point prior to the arrest, or the search, I should say, which then was followed by the arrest, he knew from some pretty good evidence that on the scene that the insurance certificate showed that the car and the license plate belonged together, and that would have at least required a further inquiry back to the dispatcher, which would have shown, as it did at some point in time, that the car and the license plate belonged to each other.

Now, he has testified that that took place after the arrest and the search. The time elements are pretty hard to come by. I'm not too sure that I would be happy basing a decision on that, but it is very clear that prior to the search he knew that the insurance certificate and the car belonged to each other.

And then, even assuming his testimony that—that they got permission to do the search, then found out later, I just don't feel a lot of credibility to that. I think the facts in the case would indicate that—that they had adequate knowledge prior to any search, that this car and the license plate belonged to each other.

MR. KERN: Your Honor, may I interrupt? I'm sorry.

With respect to that particular finding, I don't know if it will make any difference to whether or not you are going to rely on that finding, but on page

45 of the transcript, the question put to Mr. Fifer was:

[178] "And in addition, you had the license plate now associated with the Cadillac?

"Answer: Off of the insurance card?

"Question: No, sir."

And then the question is: "I'm sorry, you had the insurance card which identified the car as a Cadillac?

"Answer: Yes, sir.

"Question: And you had the name of the purported owner of the car on the insurance form?

"Answer: Yes."

So there was nothing at all having to do with the license plate number.

THE COURT: Thank you for pointing that out. I should correct myself. He did have the fact that the car—he had a description of the car such as the one there, and it was insured.

So that certainly should have been a red light to cause something, but the primary reason here is that we start out with one reason. We have police reports which say: I made a stop for one reason.

We come into trial and get an exactly opposite story about the stop as for speed. There is no state law on speed in this area. He should have known that, because this is his area.

And then we are faced with two differing [179] descriptions, and I specifically, after his direct testimony, tell him: Don't listen to the tapes, and he promptly decides to do it. For what reason, I don't know; maybe didn't hear me, but whatever it is, I think it bears crucially on his credibility in the testimony.

So the basis for the stop has to be, I think based, really, today, on what he said here as the speed. There is no law on the speed.

I have upheld searches, and I did very recently in a case involving another massive amount of cocaine, where a Border Patrol vehicle was parked off the highway, and on the interstate about 20 miles east of where this stop took place.

A truck came by at a place where everybody is going 65, 70 miles an hour, and the minute the truck sees the Border Patrol vehicle, it just stopped—not stopped, but it slows right down to 50 miles an hour, when the rest of the traffic continues on. There is no red light, there is no—nothing else.

They then pull out to look at him, and the person looks suspicious, and they pull the truck over and found 400-and-some pounds of cocaine hidden in the back of the truck in a false compartment.

I felt there that speed was a factor, because everybody is going very fast, and as soon as he sees the [180] Border Patrol officer he stops, when nobody else does. There is no red lights, there is nothing. And that's a place in the road where everybody is going lickety-split, and to just drop your speed like that is very suspicious.

This isn't that case. The man had a red light, he slows down for a red light, he speeds back up again, he just doesn't stay at one speed and then go up, he stays right at 50 miles an hour.

I think under those circumstances there just are not founded suspicion. You've got to have some basis to stop people.

And there is no question in my mind that—and I happen to think that is good police work, that when you stop somebody for a legitimate reason, it's perfectly proper to ask them: May we check your car? And you can always tell them no.

Now, I guess you've got to be worred about that, because where if you said yes, you might get a warning, and you say no, you might get a ticket, but that's not this case. The fact is, they ask, and that's perfectly all right. But we just don't get to that issue in this case.

So the motion to suppress the search of the Simpson vehicle being driven by Mr. Arcinega is granted.

I haven't given any thought, and I don't know if you have either, as to what status that puts us in. If you [181] would like to, we can go ahead, and I guess the next thing to do, really, is the motion to suppress statements or the Padillas.

* * * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CRIMINAL MINUTES (Tucson-Globe Division)

Date: May 15, 1990

88/ 317/ 03
89/ 408/ 1-6
Yr Case# Dft#

U.S.A.

vs.

PADILLA, ET AL XAVIER V

HONORABLE RICHARD M. BILBY

[Filed May 16, 1990]

* * * * *

Pursuant to Findings on the Record,
Court finds that Officer Fifer did not have founded suspicion to make the stop, therefore,

ORDERED, Motion to Suppress the Search of the Simpson Vehicle Driven by Arcinega is GRANTED.

* * * * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CR-89-408-A-RMB

UNITED STATES OF AMERICA, PLAINTIFF

vs.

XAVIER V. PADILLA, MARIA JESUS PADILLA, JORGE PADILLA, DONALD LAKE SIMPSON, WARREN STRUBBLE, MARIA SYLVIA SIMPSON, DEFENDANTS

May 30, 1990
Tucson, Arizona

HEARING ON PENDING MOTIONS

Before THE HONORABLE RICHARD M. BILBY

* * * * *

[8] THE COURT: All right. Based on the statement of facts provided to me by the Government, it's my finding that the stop which the Court has previously suppressed clearly led to the subsequent activities of that day when the car was delivered to Tempe; that without that stop, there would not have been any involvement by the DPS, nor would they have informed Customs and DEA about that.

The Customs investigation flowed directly from the fact that from the news and from the law enforce-

ment they found out that a U.S. Customs' inspector's car had been involved in this.

[9] They went to Casa Grande, contacted Mr. Arcinega; he was arrested and they discussed things with him that they wouldn't have had, they would not have known about him, had it not been for the stop of Mr. Arcinega. From that they then received information which led them directly to the other defendants.

The DEA investigation clearly flowed from the same thing, because Agent Sprout called Agent Grabowski and said that he had received information that had come from an informant regarding a recent cocaine seizure, and someone by the name of Arcinega.

Had there not been the stop, it is clear that none of that would have ever come about. It's not a "but-for" test, but it seems to me under the rulings in *U.S. versus Johns III*, 891 F.2d 243, the court talks about first whether or not it should be diminimus, and I find that it's diminimus, and stated that the court, quote, "In Bacall, the court emphasized: "It's not using a "but-for" test, but was inquiring whether the illegally-obtained evidence tended significantly to direct the investigation towards the evidence in question.' "

And I think that this statement makes it abundantly clear that is exactly what happened. So that under those circumstances I'm going to hold that they can't—it is not attenuated, and the motions to suppress will be granted.

* * * * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CRIMINAL MINUTES (Tucson-Globe Division)

Date: May 30, 1990

88/ 317/ 03

89/ 408/ 1-6

Yr Case# Dft#

U.S.A.

vs.

PADILLA, ET AL XAVIER V

HONORABLE RICHARD M. BILBY

[Filed May 30, 1990]

Proceedings:

FURTHER HEARING PENDING MOTIONS: xx Open Court

Counsel make statements to the Court.

Based on the Statement of Facts provided to the Court by the Government, the Court finds that the stop, the Court previously suppressed, clearly led to the subsequent activities of that day when the car was delivered. Without the stop, there would not have been any involvement by the DES or information to DEA.

The customs investigation flowed directly from the fact that from the news and through law enforcement investigation, the customs department found

out that a United States Customs inspector's car was involved in the stop. Customs subsequently went to Casa Grande, Arizona, contacted Mr. Arcinega, the driver of the vehicle, and had discussions with him. Customs would not have known about Mr. Arcinega had it not been for the stop, the subsequent investigation and the information subsequently received which led directly to the other defendants.

The Drug Enforcement Agency investigation clearly flowed from the same stop, and subsequent information because agent Sproat contacted agent Grabowski to advise him that Sproat had information given him by an informant regarding a recent cocaine seizure with some named Arcinega.

Had there not been a stop, it is clear to the Court that none of this investigation would have transpired. Although this is not a "but for" test, under the rulings in *US v. JOHNS*, 891 F.2nd 243, the Appellate Court first speaks as to whether or not the identification is de minimis, and this Court finds, clearly it is NOT de minimis. In *US v. BACALL*, 443 F.2nd 1050, the Court emphasized that it was not using just a "but for" test, but was inquiring whether the illegally obtained evidence "tended significantly" to direct the investigation toward the evidence in question. This Court finds it abundantly clear that this is what happened, therefore,

Under the all of the circumstances previously noted, this Court finds that it is not attenuated and the Defendant's Motions to Suppress are hereby GRANTED.

* * * * *

/s/ Richard M. Bilby
RICHARD M. BILBY
United States District Court

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45472